

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Federal-State Joint Board)	
On Universal Service)	CC Docket No. 96-45
)	
Cellular South License, Inc.)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	DA 02-1465/DA 02-3317
Throughout its Licensed Service Area)	
In the State of Alabama)	

**APPLICATION FOR REVIEW
OF THE
ALABAMA RURAL LOCAL EXCHANGE CARRIERS
("Alabama Rural LECs")**

To: The Commission

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December 30, 2002

Application for Review of the Alabama Rural LECs
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SUMMARY

The Wireline Competition Bureau (“WCB”) erred when it granted Cellular South License, Inc.’s (“Cellular South”) Petition for Designation as an Eligible Telecommunications Carrier (“ETC”) throughout its licensed service area in the state of Alabama.

In spite of the Commission’s November 8, 2002 Order seeking review by the Federal-State Joint Board on Universal Service of the Commission’s rules relating to high-cost universal service support and the designation of ETCs and recent actions by the Commission indicating concerns with the sustainability of the current universal service funding mechanism, the WCB summarily dismissed concerns raised by the Alabama Rural LECs and other parties with regard to the “nature of high-cost support with regard to competitive ETCs” by stating that “questions about the impact on the universal service fund of supporting competitive ETCs” is one of the “issues beyond the scope” of the Cellular South Order. This conclusion ignores that, pursuant to Commission directive, the entire ETC designation process is currently under review because “there have been many changes in the telecommunications marketplace”, including the receipt of more high-cost support dollars by competitive ETCs and continued growth in the USF. To summarily dismiss the concerns raised by the Alabama Rural LECs and others while review of the Commission’s rules on these very issues is pending fails to recognize that, by issuing the Cellular South Order, the WCB takes action on matters of unresolved Commission policy, namely the ETC designation process. Moreover, by issuing the Cellular South designation without addressing the high-cost support and USF concerns of the Alabama Rural LECs, the WCB takes action that is in conflict with articulated Commission policy to reconsider and revisit these questions and applies a policy that should be, and is very likely to be, overturned or revised.

The WCB also failed to adequately consider whether the designation of Cellular South as an ETC in the areas served by the Alabama Rural LECs is in the “public interest”, a requirement of the 1996 Act. Congress cannot be presumed to have done a meaningless thing when it made a distinction between the ETC designation processes for non-rural and rural telephone companies. It is incorrect to conclude that competition alone justifies multiple ETC designations in rural, high-cost areas of the state of Alabama. It is also incorrect to assume that competition does not already exist in the service areas of the Alabama Rural LECs. Yet, the Cellular South Order relies almost exclusively on competitive entry when concluding that the Cellular South designation is in the “public interest” and ignores the cost/benefit analysis articulated by the Alabama Rural LECs.

The WCB improperly justified the grant of the Cellular South designation when it relied on a prior decision with materially different facts from those presented by the Alabama Rural LECs. Rural telephone service in the state of Alabama is not equivalent to rural telephone service in the Pine Ridge Reservation of South Dakota.

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I. Introduction

On December 4, 2002 the Deputy Chief of the Wireline Competition Bureau (WCB), acting under delegated authority from the Commission, issued a decision granting the petition of Cellular South License, Inc. to be designated as an eligible telecommunications carrier (ETC) throughout its licensed service area in the state of Alabama.¹ The Alabama Rural LECs² respectfully request the Commission to review this decision under the provisions of 47 CFR § 1.115. The Alabama Rural LECs believe that sufficient questions exist regarding certain findings of fact and conclusions of law that make full Commission review of this decision

¹ *Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, Memorandum Opinion and Order, Released December 4, 2002, DA 02-3317 (the Cellular South Order).

² While not specifically listed as a part of the Alabama Rural LECs, Castleberry Telephone Company ("Castleberry") supports and adopts the positions of the Alabama Rural LECs opposing the Cellular South Petition and more specifically supports this Application for Review.

essential. In addition, this decision prematurely sets a precedent that ultimately could be harmful to the public interest, and therefore should be at least temporarily set aside by the Commission, pending the development of policy guidelines for the designation of multiple ETCs in areas served by rural telephone companies like the Alabama Rural LECs.

As grounds for this request for review, the Alabama Rural LECs offer the following:

1. On November 8, 2002, the Commission released an Order requesting the Federal-State Joint Board on Universal Service to review certain of the Commission's rules relating to high-cost universal service support.³ These rules concern the portability of high-cost support to ETCs and support for second lines, and will have a material impact on the issues in this case. The Commission should not rule on individual competitive ETC applications in high cost rural areas until these broader issues have been resolved⁴ and it was error for the WCB to find that "these issues [concerns about high-cost support to competitive ETCs] reach beyond the scope of this order."⁵
2. Recently, the Commission was forced to take the unprecedented step of borrowing funds from the Schools and Libraries fund to keep the assessment on interstate end-

³ *In the Matter of Federal-State Joint Board on Universal Service*, Order, Released November 8, 2002, FCC 02-307 (*Joint Board Referral*). This Order is cited in paragraphs 3 and 32 of the Cellular South Order.

⁴ See Alabama Rural LECs Comments at 20 and 21 (requesting that WCB "refrain from granting Cellular South's ETC petition until sufficient safeguards are in place to guarantee that the public interest is not harmed by an undermining of the Universal Service Fund and the resulting reduction in infrastructure investment, increase in rates and reduction in service quality available to high-cost, rural areas in Alabama").

⁵ Cellular South Order at paragraph 3.

user revenues from increasing from 7.3% to 9.3%.⁶ As additional CMRS providers are granted ETC status and request funding for their existing customer base, the fund will grow to unmanageable proportions.⁷ Until the portability and multiple-line funding rules are fully reviewed and finalized, it would be unwise to grant ETC petitions in the areas served by the Alabama Rural LECs or other rural study areas that would add significantly to the fund size.⁸ Thus, the WCB's finding that "to the extent that Cellular South provides new lines to currently unserved customers or second lines to existing wireline subscribers ... will have no impact on the amount of universal service support available to rural telephone companies for those lines they continue to serve"⁹ fails to consider the long range effects of multiple carrier designations on the USF and is, consequently, error.

3. The CMRS market is extremely competitive with multiple carriers serving virtually all markets, including rural markets. When one carrier is granted ETC status, others

⁶ See Public Notices DA 02-1409, Wireline Competition Bureau Announces no Change in Third Quarter 2002 Universal Service Contribution Factor, Released June 13, 2002, and Public Notice DA 02-2221, Proposed Fourth Quarter 2002 Universal Service Contribution Factor, Released September 10, 2002. (*USF Funding Notices*) In addition, on December 13, 2002, the Commission released a *Report and Order and Second Notice of Proposed Rulemaking* (FCC 02-329) addressing fundamental questions regarding the development of a sustainable mechanism for the collection of universal service funds from interstate telecommunications providers.

⁷ See Alabama Rural LECs Comments at 16 and 17 and Alabama Rural LECs September 5 *ex parte*.

⁸ See Alabama Rural LECs Comments at 20 and 21 and Alabama Rural LECs Reply Comments at 5 through 8.

⁹ Cellular South Order at paragraph 28.

can be expected to apply also, if only to remain competitive.¹⁰ It is estimated that if all CMRS providers nationwide are granted CETC status, then the added impact on the fund could be explosive.¹¹ While recognizing that this is an important issue, the WCB wrongly concludes “that these issues are beyond the scope of this Order....”¹²

4. The Alabama Rural LECs presented evidence suggesting that a rural competitive ETC application could be found to be in the public interest only when the benefits from supporting multiple carriers exceeded the costs of supporting multiple networks.¹³ They further stated that these costs included both the increase in the size of the fund as a result of supporting multiple carriers, and the loss of network efficiency when multiple carriers serve sparsely populated rural areas.¹⁴ Once again, the Order, while recognizing that these are important issues regarding high-cost support, finds that such issues are “beyond the scope of this Order, which designates a

¹⁰ The Cellular South proceeding, along with the companion proceeding for RCC in Alabama, has been closely watched nationwide. One reason for this attention is that many of the service areas of these two carriers overlap. *See, e.g.*, Reply Comments of the APSC at 2-4 (noting the overlap between the two petitions).

¹¹ *See* Alabama Rural LECs Reply Comments at 5 and 6 and Alabama Rural LECs September 5 *ex parte* at McLean & Brown paper, pages 2 and 3.

¹² Cellular South Order at paragraph 32. *See also* paragraph 3.

¹³ *See* Alabama Rural LECs Reply Comments at 7 through 9 and Alabama Rural LECs October 2 *ex parte*.

¹⁴ *Id.*

particular carrier as an ETC”.¹⁵ We believe this interpretation to be incorrect, and that each grant of ETC status must pass the cost/benefit test.

5. In justifying its conclusions that the grant of competitive ETC status to Cellular South is in the public interest, the WCB relies heavily on its decision regarding Western Wireless’ petition for ETC status on the Pine Ridge Reservation in South Dakota.¹⁶ The facts and data in that case are very different from the facts in this case, and thus the WCB’s conclusion that the grant of ETC status to Cellular South will indeed serve the public interest is erroneous.

The Commission stands at a juncture and has difficult choices to make regarding the future of universal service. Barring the emergence of some new source of funding, there is simply not enough money in the system to continue funding access to affordable wireline infrastructure in rural America, and also provide identical per-line funding to wireless providers who are currently serving, or may serve, portions of these same areas. At its roots, universal service was about assuring that all customers, no matter how far away or how remote, had an affordable connection to the telephone network. More recently, universal service has taken on aspects of a venture fund to create “competition” in high-cost areas, and to bring alternative technologies to rural America. It is becoming painfully obvious, and will likely become more so in the coming months, that we may not be able to do both. Until the new paradigm for universal service emerges, it is not good public policy to continue to believe that we can.

¹⁵ Cellular South Order at paragraphs 3 and 32.

¹⁶ Cellular South Order at paragraph 25.

In the Sections below, the Alabama Rural LECs will discuss each of these points and why Commission review of the Cellular South Order is essential for the protection of the public interest.

II. Background

The Cellular South Petition was filed with the Commission pursuant to Section 214(e)(6) of the Communications Act on the basis of Cellular South's contention that the APSC had issued an "affirmative statement" that it lacked jurisdiction to designate a CMRS carrier as an ETC.¹⁷ The WCB's Order designates Cellular South as an ETC for multiple service areas in the state of Alabama, involving exchanges served by both rural and non-rural carriers.¹⁸

Of the Alabama Rural LECs affected, the WCB designated Cellular South as an ETC in the entire study areas of the following carriers: Castleberry Telephone Company, Gulf Telephone Company and Millry Telephone Company, Inc.¹⁹ The WCB also designated Cellular South as an ETC in those portions of the study areas of the following Alabama Rural LECs for which Cellular South is not licensed to serve the carriers' study areas completely: Butler Telephone Company, Inc., Frontier Communications of the South, Inc. and Frontier Communications of Alabama, Inc.²⁰ Cellular South's designation for these portions of study

¹⁷ Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, June 4, 2002 ("Cellular South Petition").

¹⁸ Cellular South Order at paragraph 33.

¹⁹ Cellular South Order at paragraph 33 and at Appendix B.

²⁰ Cellular South Order at paragraph 33 and Appendix C.

areas is subject to agreement by the APSC.²¹ The study area redefinition proposed by Cellular South and accepted by the WCB is that of wire center boundary of these affected Alabama Rural LECs, with one exception.²² Because Cellular South cannot serve the entire Butler wirecenter of Butler Telephone Company, Inc., Cellular South has been granted ETC designation to serve a portion of that wire center.²³ With the addition of the Cellular South Order, Millry Telephone Company, for example, now has two additional ETCs designated for operation in its study area.²⁴ With the issuance of these companion WCB orders, seven of the Alabama Rural LECs are facing redefinition of their service areas by wire center boundaries and four are facing an even further redefinition.²⁵

III. Factors Warranting Commission Review.

The Alabama Rural LECs are aggrieved by the action taken by the WCB. In addition to the evidence presented by the Alabama Rural LECs and cited herein, two recent developments underscore why the Commission should consider the questions presented herein: (i) the Commission's referral of certain essential issues regarding ETC designations and high-cost

²¹ Cellular South Order at paragraphs 2 and 33.

²² Cellular South Order at paragraph 34.

²³ *Id.*

²⁴ See Cellular South Order at Appendix B and *RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama*, Memorandum Opinion and Order, Released November 27, 2002, DA 02-3181 (the RCC Order) at Appendix C.

²⁵ See Cellular South Order at paragraph 34 and footnote numbered 123 (referencing the RCC Order at paragraph 37). See also APSC Reply Comments at 2 and 3 (expressing concern about the overlap between the Cellular South and RCC Petitions).

support to the Joint Board;²⁶ and, (ii) the Commission's recent actions to protect the USF pending a more fundamental reform of the mechanism for assessing universal service contributions.²⁷ Both of these proceedings indicate that the Commission has not fully resolved the process for designating ETCs and extending high-cost support to CETCs in rural areas like those served by the Alabama Rural LECs. In fact, the Commission specifically requests the Joint Board to "examine the process for designating ETCs."²⁸ Consequently, the WCB's action involves a policy that has not been resolved by the Commission.²⁹ Alternatively, the WCB action involves application of precedents that (1) are in conflict with the Commission's articulated policy as set forth in the *Joint Board Referral*³⁰ and (2) should be, and by all indications are going to be, overturned or revised.³¹ In justifying its "public interest" finding, the WTB relies on the decision in a prior case with materially different facts. Thus, the WCB action involves erroneous findings as to important or material questions of fact.³²

²⁶ *Joint Board Referral*.

²⁷ *USF Funding Notices*.

²⁸ *Joint Board Referral* at paragraph 1.

²⁹ 47 CFR § 1.115(b)(2)(ii).

³⁰ 47 CFR § 1.115(b)(2)(i).

³¹ 47 CFR § 1.115(b)(2)(iii).

³² 47 CFR § 1.115(b)(2)(iv).

IV. Argument

A. Important policy considerations relating to the funding of multiple ETCs and multiple lines have been referred to the Joint Board.

On November 8, 2002 the Commission issued an Order³³ requesting the Federal-State Joint Board on Universal Service to review certain of the Commission's rules relating to the high-cost universal service support mechanisms to ensure that the dual goals of preserving universal service and fostering competition continue to be fulfilled. The Commission requests the Joint Board to examine three specific areas:

- High-cost support levels in study areas with competitive Eligible Telecommunications Carriers (CETCs),
- Support for "second" lines, and
- The process for designating CETCs.³⁴

Regarding the level of support, the Commission notes that under current rules CETCs receive the same per-line support as the incumbent. The Commission also states that some parties have argued that this creates a "windfall" for CETCs, while others have argued that this is necessary to preserve "competitive neutrality".³⁵ The Commission directs the Joint Board to:

- Review the methodology for calculating support for ETCs in competitive study areas, and
- Examine the rules governing calculation of high-cost support for CETCs using UNEs, and

³³ *Joint Board Referral.*

³⁴ *Id.* at paragraph 1.

³⁵ *Id.* at paragraph 7.

- Address the current rules that cap the funds available to rural ILECs while not capping funds to CETCs. Specifically, the FCC asks the Joint Board to address the potential benefits and costs of modifying these rules for stability, predictability and sufficiency of the fund, and for competitive neutrality, and
- Consider whether modification in procedures for determining the location of a line served by a mobile wireless provider (i.e., the billing address) is necessary.³⁶

Regarding support for multiple lines and carriers, the Commission notes that under current rules all residential and business lines provided by all ETCs are eligible for high-cost support. The Commission asks the Joint Board to:

- Consider the extent to which supporting second lines impacts the size of the universal service fund, and
- Consider whether the goals of section 254 would be served if support were limited to a single connection to the end-user – whether provided by the incumbent or the CETC, and
- Consider whether such a rule would be competitively neutral and how it would impact competition.³⁷

The Commission notes that some parties have claimed that the current system has hampered the emergence of competition in rural areas, while others have suggested that state commissions should impose similar universal service obligations on ILECs and CETCs. The Commission asks the Joint Board to:

- Consider whether it is advisable to establish federal processing guidelines for ETC applications, and
- If so, what should be included in such guidelines, and

³⁶ *Id.* at paragraphs 5 through 9.

³⁷ *Id.*

- To what extent should the FCC provide additional guidance on the impact of the disaggregation of support on the designation of a service area other than the ILECs study area?³⁸

Each of the items that the Commission has requested the Joint Board to examine will have a significant impact on the further consideration of designation of competitive ETCs, and on the expectations of all ETCs as to the high-cost funding that they will receive. The public interest criteria required for grant of the applications cannot be applied without consideration of these issues. For this reason, pending full Commission review of these issues, it is premature for the WCB to designate any additional ETCs in rural areas like those served by the Alabama Rural LECs.

For example, as noted previously, under current application of the Commission's rules all lines provided by any ETC, whether the incumbent or a competitor, receive funding. Should the Commission decide to limit funding to one "primary" line per customer location this will significantly change the amount of funding carriers will receive. A carrier that may have been willing to commit to construct facilities to serve all customers in its service area under the expectation of funding for all existing and future lines, may face different economics and make different decisions if it will only receive funding for lines that are deemed to be "primary" lines through some as yet unknown process. A change in the rules regarding second lines could also substantially affect the impact of a rural ETC grant on rural carriers situated like the Alabama Rural LECs. Similarly, under current application of the rules, wireless carriers receive the same per-line funding as the wireline incumbent. The Commission has asked the Joint Board to

³⁸ *Id.* at paragraph 10.

examine whether this continues to be appropriate.³⁹ In the event that the Commission finally determines that different funding amounts should be provided to wireless carriers this could likewise affect their ability and willingness to commit to investment in additional plant and facilities.

The nature of the mobile services provided by Cellular South highlights the importance of this issue, because Cellular South will obtain customers with residences located in rural ILEC territory; those customers will primarily use their Cellular South service in locations well beyond the geographic constraints of the area designated for support; and, ultimately high cost support will be paid to Cellular South for services used in low-cost, urban areas.⁴⁰

Finally, the Commission has asked the Joint Board to consider the system for resolving requests for ETC designations under section 214(e)(2) of the Act, and to consider the universal service obligations that competitive ETCs should be required to undertake.⁴¹ If the Joint Board were to recommend, and the Commission were to decide that competitive ETCs needed to assume obligations similar to the incumbent LEC (for example, equal access to interexchange carriers, resale and unbundling obligations, or rate regulation) some wireless carriers might be less willing to meet the obligations of being an ETC.

Thus, until this significant review of universal service portability rules and policy is resolved, it is pointless to continue to designate competitive ETCs in rural areas served by the

³⁹*Joint Board Referral* at paragraph 6.

⁴⁰ *See* Comments of the Alabama Rural LECs at 16.

⁴¹*Joint Board Referral* at paragraphs 7 and 10.

Alabama LECs and by other similarly situated rural carriers under the assumption that the current rules and procedures will continue unchanged.

B. The Commission has been required to take interim actions in an effort to insure that the current fund size is sustainable.

Currently, the money needed to pay high-cost support to ETCs is raised by an assessment on end-user interstate revenues of all telecommunications carriers. In the second quarter of 2002, this assessment was 7.3% of interstate end-user revenues.⁴² When the third and fourth quarter calculations were performed, it was determined that this percentage would need to be increased to 8.8% and 9.3%, respectively.⁴³ In the initial universal service order in 1997 the Commission recognized that “overly expansive universal service mechanisms potentially could harm all consumers by increasing the cost of telecommunications services for all”.⁴⁴ In order to avoid these increases, the Commission took the unprecedented step of “borrowing” unused Schools and Libraries money to keep the third and fourth quarter 2002 contribution levels, at the same level as in the second quarter. In justifying this the Commission stated:

In the *Schools First Report and Order*, the Commission concluded that unused funds from the schools and libraries support mechanism would be applied to stabilize the collection requirement for universal service in the third and fourth quarters of 2002, and the first quarter of 2003, if necessary, while it examines

⁴² Public Notices DA 02-1409, Wireline Competition Bureaus Announces no Change in Third Quarter 2002 Universal Service Contribution Factor, Released June 13, 2002.

⁴³ See *id.* and Public Notice DA 02-2221, Proposed Fourth Quarter 2002 Universal Service Contribution Factor, Released September 10, 2002.

⁴⁴ *First Report and Order*, 12 FCC Rcd at 8828-8830, paragraphs 94 – 96.

whether more fundamental reform of the basis for assessing universal service contributions is warranted.⁴⁵

These actions indicate that the Commission is concerned about the sustainability of the current support mechanism, even at current levels of support funding. As additional CMRS providers are granted ETC status and request funding for their existing customer base⁴⁶, the fund will grow to unmanageable proportions⁴⁷. For this reason the Commission should not rule on individual ETC applications in rural areas, including the request of Cellular South for ETC status in the service territory of the Alabama Rural LECs, until its portability and multiple-line funding rules are fully reviewed and finalized.

C. Funding for all existing CMRS lines in rural study areas will result in an explosion of the USF to unsustainable levels.

To date, the impact of portability of support to wireless carriers has been relatively modest, but has been growing at a significant rate.⁴⁸ In fact, in the *Joint Board Referral*, the Commission commented on this trend:

[B]ased on Universal Service Administrative Company (USAC) data, competitive ETCS received approximately \$14 million out of \$803 million high-cost support disbursed in the third quarter of 2002, or 1.8% of total high-cost support. This is up from approximately \$2 million out of \$638 million high-cost support disbursed in the first quarter of 2001, or 0.4% of total high cost support.⁴⁹

⁴⁵ *Proposed Fourth Quarter 2002 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice DA 02-2221, Released September 10, 2002, at page 2.

⁴⁶ See *Joint Board Referral* at paragraph 4.

⁴⁷ See Alabama Rural LECs Reply Comments at 5 and 6 and Alabama Rural LECs Sept. 5 *ex parte* at McLean & Brown paper at 2 and 3.

⁴⁸ *Id.*

⁴⁹ *Joint Board Referral* at paragraph 4.

A further summary of the USAC data referenced by the Commission (assembled here in tabular form) indicates that the annualized amount of high-cost funding going to wireless providers with approved ETC status from the fourth quarter of 2001 through the first quarter of 2003.⁵⁰

<u>Quarter</u>	<u>Annualized CMRS Funding</u>
4Q01	\$9.1M
1Q02	\$8.3M
2Q02	\$47.9M
3Q02	\$63.6M
4Q02	\$61.4M
1Q03	\$106.6M

As noted by the Commission, “as competitive ETCs enter new markets and expand services, they are increasingly qualifying for high-cost universal service support.”⁵¹ Also notable is the fact that this impact is coming from a relatively few regional CMRS providers operating in a relatively small number of states.⁵² In fact, many wireless providers have been waiting on the sidelines to see how the pending contested ETC applications would be resolved.⁵³ It can reasonably be expected that there will soon be many new applications for ETC status, resulting in enormous pressure on the USF. The Alabama Rural LECs, as well as other parties

⁵⁰ See USAC HC01 Reports for 4Q01 through 1Q03. See also Reply Comments of Alabama Rural LECs at 6.

⁵¹ *Joint Board Referral* at paragraph 4. In fact, the issuance of the Cellular South Order and the RCC Order substantiate the Commission’s conclusion and suggest that no rural carriers will be able to overcome a conclusion the competition alone is sufficient to meet the “public interest” requirement of the 1996 Act.

⁵² See Alabama Rural LECs September 5 *ex parte* at McLean & Brown paper at 3.

⁵³ The Alabama ETC cases, RCC and Cellular South, have drawn particular attention since these companies have significant overlap in the territory that they serve. As previously noted, since the WCB has issued Orders approving both applications, this will be viewed as a signal that the Commission will approve multiple wireless ETC applications in rural service territories.

participating in this proceeding, assert that this potential explosion in the USF cannot be ignored.⁵⁴

Given the funding difficulties discussed in the previous section, even a fraction of this potential impact would seriously threaten the ability of USAC to pay support to existing ETCs. Since many local carriers rely on this support for a significant portion of their operating cash flow, any significant disruption of this support could have dire consequences for these carriers ability to meet their service obligations to their customers, and be clearly contrary to the public interest.

D. The Commission must consider the cost/benefit relationship of each competitive ETC application.

As the foregoing discussion has clearly illustrated, there is not an unlimited pool of money to fund all potential competitors to serve all high-cost rural areas. The federal high-cost universal service fund is indeed a scarce national resource that must be managed in such a way as to assure that the dual goals of universal service and competition are achieved. The 1996 Act

⁵⁴ See Alabama Rural LEC Comments at 16 through 19, Alabama Rural LEC Reply Comments at 5 and 6, APSC Reply Comments at 3 through 7 and NTCA Comments at 7 through 9. See also Alabama Rural LECs September 5, October 2 and October 15 *ex partes*. In fact, publicly available data indicate that the impact of ETC status for all CMRS providers nationwide would increase the demand on the high-cost fund by over \$2B per year. (This number is derived by taking the ratio of wireless access lines to wireline access lines and multiplying this ratio (69%), and multiplying this by the current \$3.2 billion of federal high-cost report as stated on USAC HC01 for the first quarter of 2003. The 69% ratio was developed using data from Commission's recently released Seventh Report to Congress regarding Competitive Market Conditions With Respect to Commercial Mobile Services, released Dec. 9, 2002, and USAC Report HC01 for the second quarter of 2002.)

states that multiple ETCs shall be designated in the area served by a rural telephone company only when such designation is found to be in the “public interest”.⁵⁵

A key to developing an effective universal service policy will be to define, with some specificity, exactly what the “public interest” means with respect to the definition of multiple ETCs in areas served by rural telephone companies. To some parties the mere introduction of competition itself satisfies the public interest.⁵⁶ The Alabama Rural LECs have advocated in this proceeding, as well as in the RCC proceeding, that the public interest is advanced when the benefits that will be derived from supporting multiple carriers exceed the cost of supporting multiple networks.⁵⁷ As indicated in their Reply Comments⁵⁸ and as described in the materials included with the Alabama Rural LECs September 5 *ex parte*, recent court cases have also begun to confirm that the 1996 Act did not mandate that competition be forced in all cases. In *U.S. Telecommunications Association v. FCC*, the Court of Appeals for the D.C. Circuit comments that the Commission needs to look at differentiated markets, and that “synthetic competition” is not what Congress had in mind.⁵⁹ In *Verizon v. FCC*, Justice Breyer states that the Statute

⁵⁵ 47 U.S.C. § 214(e)(2) and (6).

⁵⁶ See Cellular South Holdings Petition at 14 and 15 (*e.g.*, will “further the public interest by bringing the benefits of competition”; a principal goal of the 1996 Act is promoting competition; and, ETC designation “will bring to consumers the benefits of competition”).

⁵⁷ See Alabama Rural LECs Reply Comments at 7 through 9 and Alabama Rural LECs September 5, 2002 and October 2 *ex partes*.

⁵⁸ See Alabama Rural LECs Reply Comments at 8 and 9 (footnote numbered 20).

⁵⁹ *U.S. Telecommunications Association v. FCC*, 290 F. 3d 415, 424 (2002).

supports competition “in so far as local markets can support that competition without serious waste.”⁶⁰

There is also a prevalent myth that there is currently no competition in rural America,⁶¹ and that only by granting ETC status to wireless carriers will rural consumers experience the benefits of competition. Nothing could be farther from the truth. Wireless carriers serve throughout rural America.⁶²

However, if Congress had intended that ETCs be approved in all areas served by rural telephone companies then they would have said so, as they did for areas served by non-rural telephone companies. By stating that additional ETCs should only be designated in rural areas where a regulatory body finds that such designation is in the public interest⁶³, Congress clearly contemplated that there would be some areas where it would not. It is highly likely that there is some subset of rural America that is not capable of supporting multiple carriers. Commissioner Martin has recognized this in his statement issued with the MAG Order.

I also note that I have some concerns with the Commission’s policy – adopted long before this Order – of using universal service support as a means of creating “competition” in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of

⁶⁰ *Verizon Communications, Inc. v. FCC*, 535 U.S. ___, Part II (2002), Justice Breyer (concurring in part and dissenting in part).

⁶¹ See RCC Holdings Petition at 14 (“bringing the benefits of competition to an underserved marketplace”).

⁶² See Alabama Rural LECs October 2 and 15 *ex partes*.

⁶³ 47 U.S.C. § 214(e)(2) and (6).

scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund.⁶⁴

The reality is that in certain sparsely populated rural markets the costs of providing basic telecommunications service are so high for even one provider, that attempts by policy makers to artificially create competition through governmental subsidy are doomed to both economic and policy failure that will ultimately harm rural consumers and the public interest.

In their advocacy in this proceeding, the Alabama Rural LECs presented evidence related to the correlation between subscriber density and the cost of providing basic telephone service.⁶⁵ The Alabama Rural LECs also provided specific population density data for each of the affected rural study areas. In addressing this evidence, the WCB states:

The evidence submitted is typical of most rural areas and does not, in and of itself demonstrate that the designation of Cellular South as an ETC will harm the affected rural telephone companies or undermine the Commission's policy of promoting competition in all areas, including high-cost areas. Moreover, the federal universal service support mechanisms support all lines served by ETCs in rural and high-cost areas. Under the Commission's rules, Cellular South's receipt of high-cost support will not affect the per line support that the incumbent carrier receives.⁶⁶

The Alabama Rural LECs suggest that the conclusions reached in this passage are incorrect for several reasons. First, as discussed previously, the Commission has recently initiated a proceeding with the Joint Board that could well result in support only being provided

⁶⁴ 2nd R&O and FNPRM in CC Docket No. 00-256, 15th R&O in CC Docket No. 96-45, and R&O in CC Docket Nos. 98-77 and 98-166, Released November 8, 2001, *Separate Statement of Commissioner Kevin J. Martin*.

⁶⁵ See Alabama Rural LECs Reply Comments at 7 through 9 and Alabama Rural LECs September 5 and October 2 and 15 *ex partes*.

⁶⁶ Cellular South Order at paragraph 28.

to “a single connection to the end-user – whether provided by the incumbent or a competitive ETC”.⁶⁷ Under such a scenario harm could occur both to the incumbent provider as well as to the competitive ETC. Harm would come to the incumbent to the extent that the competitive provider is chosen as the “primary” carrier. Harm would also come to a competitive ETC that had anticipated support for all of its lines when it made commitments to expand its infrastructure, but later found that many of its lines were not designated as “primary”. Both the incumbent and the new ETC would be harmed by the phenomenon identified by Commissioner Martin, and illustrated by the Alabama Rural LECs, that as the number of customers served (or supported) in high cost rural areas decreases, the ability of the carrier (wireline or wireless) to support the fixed costs of its network will become increasingly challenged.

The second reason that the conclusion is incorrect is that if significant numbers of wireless carriers are granted ETC support for all of the customers that they currently serve, the fund size will become unsustainable. Again, this will harm both incumbent and competitive ETC alike, as they will be unable to receive the funding necessary to support the network infrastructure necessary to serve their customers.

Finally, in addressing those concerns expressed in this proceeding regarding ETC designation in extreme cost rural areas, the Cellular South Order states:

Although we find these issues reach beyond the scope of this Order, which designates a particular carrier as an ETC, we recognize that these are important issues regarding universal service high-cost support. We note that the Commission has recently requested the Federal-State Joint Board on Universal Service to provide recommendations on the Commission’s rules relating to high-

⁶⁷ *Joint Board Referral* at paragraph 9.

cost support in study areas in which a competitive ETC is providing service, as well as the Commission's rules regarding support for second lines.⁶⁸

The Alabama Rural LECs respectfully suggest that the WCB has the relationship here exactly backwards. Sound public policy can only be made based upon sound principles. Before the Commission begins designating competitive wireless ETC in high-cost rural areas it must first establish the appropriate principles and guidelines that will determine how the public interest determinations will be made. The Commission recently underscored the need to resolve this policy question with the issuance of its *Joint Board Referral* Order. The issuance of the Cellular South Order, as well as the RCC Order, prior to that resolution is in direct conflict with the expressed intent of the Commission to insure that the "dual goals of preserving universal service and fostering competition continue to be fulfilled."⁶⁹

E. The facts of the Cellular South case are very different from the Pine Ridge case.

In explaining its findings that the grant of Cellular South's ETC petition would be in the public interest the WTB states "[t]he Commission has held that designation of qualified ETCs promotes competition and benefits consumers by increasing customer choice, innovative services, and new technologies".⁷⁰ As justification for this statement the Commission cites their decision granting Western Wireless ETC designation on the Pine Ridge Reservation in South Dakota.⁷¹

⁶⁸ Cellular South Order at paragraph 3.

⁶⁹ *Joint Board Referral* at paragraph 1.

⁷⁰ Cellular South Order at paragraph 25.

⁷¹ *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket No. 96-45, Memorandum, Opinion and Order, 16 FCC Rcd 18133 (2001). (*Western Wireless Pine Ridge Order*).

The facts and record in that case are very different from the facts and record in the Cellular South case. In justifying its decision, the Commission stated:

We note that tribal members residing on the Pine Ridge Reservation may face impediments to affordable telecommunications service that may be addressed by the introduction of wireless service.⁷²...In the *Twelfth Report and Order*, the Commission noted that along with depressed economic conditions and low per capita incomes, the following factors have been identified as impediments to subscribership on tribal lands: (1) the cost of basic service; (2) the cost of intrastate toll service (due to limited local calling areas); (3) inadequate telecommunications infrastructure and the cost of line extensions and facilities deployment in rural areas; and (4) lack of competitive service providers offering alternative technologies. The record indicates that such impediments to subscribership exist on the Pine Ridge Reservation...[I]t is clear that subscribership on the reservation is substantially lower than the national average of approximately 94 percent...[T]he lower-than-average subscribership levels on tribal lands are largely due to the lack of access to and/or affordability of telecommunications services in these areas.⁷³

While these facts obviously played a role in the Commission's decision to grant ETC status in the Pine Ridge case, the facts and data regarding the grant of Cellular South's petition in Alabama area quite different. No evidence of "impediments to affordable telecommunications service" was presented in this case. Statements that "service is available to all known inhabited rural residences in Alabama within [the Alabama Rural LECs] territory", and that "ninety four (94%) of the inhabited residences in Foley (Alabama) subscribe to its telephone service"⁷⁴ are unrefuted on the record. Data posted on the Wireless Telecommunications Bureau web site in conjunction with Tribal Bidding Credits indicates that that the "wireline subscription rate" on the

⁷² *Western Wireless Pine Ridge Order* at paragraph 11.

⁷³ *Id.* at paragraph 13.

⁷⁴ Alabama Rural LEC Comments at 3.

Pine Ridge Reservation is 41.4%.⁷⁵ This data indicates that subscription on the Pine Ridge reservation is dramatically different from the previously cited 94% subscription rate in the Alabama Rural LEC territory. Cellular South is competing for and winning customers in its serving area,⁷⁶ and incumbent LECs are experiencing the effects of this competition through loss of lines and long distance minutes. The facts that significant portions of the Pine Ridge Reservation were without service would likely have placed additional weight on the benefits side of the cost/benefit analysis for this area. The record indicates no lack of service capability in the service areas for which Cellular South seeks ETC designation.

The territory of the Alabama Rural LECs is not the Pine Ridge Reservation, and it is incorrect to assume that the policy prescriptions that may have been appropriate for the dramatic situation on the Pine Ridge Reservation are equally appropriate for the rural areas served by the Alabama Rural LECs. The WCB's reliance on the Pine Ridge case constitutes a clearly erroneous finding as to very important facts, and is another factor justifying Commission review.

⁷⁵ See http://wireless.fcc.gov/auctions/data/crossreferences/att_1_ver.xls. The "Properties" section of this EXCEL spreadsheet indicates that this data was compiled on October 12, 2000.

⁷⁶ See Alabama Rural LECs October 15 *ex parte*.

V. Relief Sought

In light of the forgoing, the Alabama Rural LECs would respectfully request the Commission to do the following⁷⁷:

1. Set aside the decision of the WCB granting ETC status to Cellular South in the state of Alabama until appropriate policy guidelines for the designation of multiple ETCs are developed and finalized, and
2. Proceed with the Joint Board process in response to the Commission's Order of November 8, 2002 to develop an appropriate record for the development of these policy guidelines, and
3. Upon completion of the Commission's process, issue specific guidelines for the consideration of multiple ETCs in areas served by rural telephone companies including:
 - a. The appropriate factors for consideration in determining when multiple ETCs in areas served by rural telephone companies are in the public interest.
 - b. Specific facts and data to be submitted by parties seeking or opposing the designation of a particular ETC in a particular rural telephone company study area.
 - c. Specific obligations that a carrier assumes when it accepts ETC responsibility.


⁷⁷ Each of following elements of the requested relief is in keeping with the relief requested by the Alabama Rural LECs throughout this proceeding. See footnote numbered 4 herein, *supra*.

VI. Conclusion

The Cellular South Order must be set aside, pending resolution of various matters associated with high-cost support, the USF and the ETC designation process. Otherwise, the continued grant of ETC designations will generate policy on an issue that is as yet unresolved by the Commission. The WCB erred when it summarily dismissed the concerns raised by the Alabama Rural LECs and others while review of the Commission's rules on these very issues is pending. The Alabama Rural LECs, the APSC and NTCA each expressed concerns and presented evidence sufficient to justify denial of the Cellular South Petition and certainly sufficient to delay its grant until the Commission resolves crucial issues that are intricately intertwined with the Cellular South petition. Simply put, the action of the WCB is in conflict with articulated Commission policy to reconsider and revisit these questions and actually applies a policy that should be, and is very likely to be, overturned or revised.

Respectfully submitted,

Alabama Rural LECs

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December 30, 2002

CERTIFICATE OF SERVICE

I, Leah S. Stephens, hereby certify that on this 30th day of December, 2002, a true and correct copy of the above and foregoing APPLICATION FOR REVIEW OF THE ALABAMA RURAL LECs, unless otherwise designated, has been forwarded by U.S. Mail, first class, postage prepaid and properly addressed to:

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Application for Review of the Alabama Rural LECs
CC Docket 96-45, DA 02-1465/02-3317
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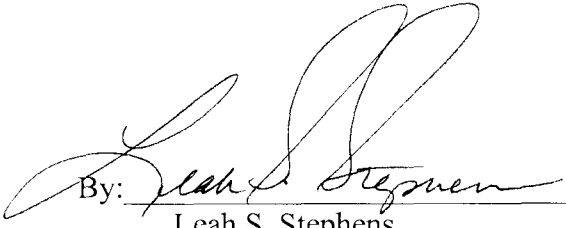
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